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IN THE

Supreme Court of the United States

October Term, 1951

No. 425

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570-50

STOW MANUFACTURING COMPANY, INC.,

Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

WILLIAM J. DONOVAN,
Counsel for Petitioner.

Of Counsel:
GEORGE G. COUGHLIN,
CARBERY O'SHEA,
SIDNEY P. HOWELL, JR.

November 12, 1951.

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Petitioner,

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COMMISSIONER OF INTERNAL REVENUE,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Stow Manufacturing Company, Inc. prays that a writ of certiorari issue to review the order of the United States Court of Appeals for the Second Circuit, entered in the above entitled case on July 17, 1951 (R. 26), affirming the decision of The Tax Court of the United States. On August 14, 1951 said Court of Appeals, by order, denied the petition for a rehearing which petitioner duly filed (R. 27).

Opinions Below

The findings of fact and opinion of the Tax Court (R. 4-13) are reported in 14 T. C. 1440. The opinion of the Court of Appeals (R. 21-25) is reported in 190 F. (2d) 723.

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Jurisdiction

The jurisdiction of this court is invoked under 28 U. S. C., Sec. 1254 (1).

Questions Presented

1. Is the Commissioner of Internal Revenue bound by the tax credit he determined for the Secretary of Navy, who, acting under the war powers conferred by the Renegotiation Act, stipulated such credit as final in a binding renegotiation contract between a contractor and the United States?

Does the Renegotiation Act authorize the Secretary to stipulate as final—rather than as merely tentative—such tax credit he must allow against the contractor's gross excessive profits, and thereby to settle conclusively all aspects of such profits?

2. Is not the tax credit allowed against excessive profits in reality a collection of excessive profits, so that the Commissioner under the guise of a tax deficiency cannot alter such credit and seek an amount which the renegotiation contract bars the United States from collecting?

Statutes Involved

The statutory provisions pertinent to this case are printed as Appendix A to this petition and brief.

Statement of Case

In the year 1942 petitioner made excessive profits, on which it paid the taxes due, on its United States Navy con-

tracts for manufacturing and supplying flexible shafting used in remotely operating ship valves (R. 5). In 1943 petitioner and the United States entered into a final renegotiation agreement, pursuant to the Renegotiation Act of 1942,[1] as to such 1942 excessive profits (R. 7).

The Renegotiation Act required that gross excessive profits be eliminated and recouped. The Secretary of the Department involved in the particular contract was required to allow against such gross profits the credit provided by Section 3806(b) of the Internal Revenue Code. Such credit is the decrease in taxes assessed resulting from eliminating the excessive profits from petitioner's gross income for the renegotiated year. Only the profits remaining after the credit were repayable in cash. The credit plus the cash repayment results in the Government recouping the gross excessive profits. The Secretary was authorized to make such final agreements as he deemed desirable for recovering excessive profits.

The contract here involved recited that the parties desired a final agreement determining excessive profits and discharging petitioner's liability therefor. It stated that the Secretary of Navy found petitioner had realized $350,000 excessive profits in the year 1942, and that the

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[1] Sixth Supplemental National Defense Appropriation Act, 1942, Title IV, Section 403 (56 Stat. 245, April 28, 1942) as amended by the Revenue Act of 1942, Section 801 (56 Stat. 982, October 21, 1942). Substantially the same procedure therein outlined is applicable today to national defense contracts under the Renegotiation Act of 1948 (62 Stat. 259, May 21, 1948) and the Renegotiation Act of 1951 (65 Stat. , Act of May 23, 1951, ch. 15, Title I).

Treasury Department reported petitioner's 1942 income and excess profits taxes would be decreased $280,000 by eliminating the $350,000 excessive profits from petitioner's 1942 income (R. 7-8).

The renegotiation contract required petitioner to pay the United States $70,000 ($350,000 excessive profits less $280,000 agreed as the credit applicable against such profits) in full discharge of all liability to repay any excessive profits (R. 8). The contract specifically stipulated that the tax credit of $280,000 allowed against the excessive profits "shall be the only refund of or credit against Federal taxes to which the Contractor shall be entitled by reason of elimination of said excessive profits." (R. 8)

The contract, and the Act, expressly provided that the agreement "shall not be modified by any officer, employee or agent of the United States, and any determination made in accordance herewith shall not be annulled, modified, set aside or disregarded in any suit, action or proceeding." (R. 8-9)

Petitioner's Board of Directors approved the contract after it was explained that it would be a "closed agreement" and that of the $350,000 excessive profits determined petitioner had to repay only $70,000 in cash to the United States due to the $280,000 credit allowed (R. 7). Petitioner duly performed all its obligations under the contract (R. 9).

Five years later respondent upon examining petitioner's 1942 excess profits tax return decided that the $280,000

"credit allowed was too large by $27,000 and assessed that sum as a deficiency for the year 1942" (R. 22).[2]

The Tax Court sustained the deficiency solely on the ground this case was governed by its prior decision in *Baltimore Foundry and Machine Corporation*, 7 T. C. 998 (a tax computation case involving a type of renegotiation agreement which did not stipulate the tax credit or the cash repayment). The Court of Appeals affirmed on the ground that the Secretary was limited to allowing against excessive profits only a tentative or provisional credit subject to later alteration by the Commissioner (R. 21). The Court omitted any reference to the most vital fact in this case: that the stipulated $280,000 tax credit was "the only refund of . . . taxes to which the Contractor shall be entitled by reason of elimination of said excessive profits." (R. 8)

Reasons For Granting The Writ

1. The sanctity of the contractual promise of the United States is here at stake. The Commissioner, under the guise of the tax deficiency procedure, has breached the solemn contract the United States made with a citizen. A Government contract in its various aspects may concern many different United States agencies. One agency of the United States, when later dissatisfied with a contractual stipula-

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[2] Respondent in 1943 computed and certified to the Secretary the $280,000 credit. He advised that he used the legally correct computation method (R. 6). Relying upon his determination petitioner and the Secretary incorporated such credit as final in the renegotiation contract. Apparently in 1948 respondent considered that his 1943 computation method was based on his own erroneous interpretation of the tax statutes.

tion another agency made with full statutory authority in the name of the United States, should not be permitted to disregard the contract.

The petitioner accepted it as a "closed agreement" settling all aspects of excessive profits. By the contract petitioner relinquished its right to contest the $350,000 excessive profits determination. Relying upon the $280,000 tax credit allowed and stipulated, petitioner agreed to repay $70,000 in full discharge of its excessive profits liability. Five years later the Commissioner, solely on account of eliminating the agreed excessive profits from petitioner's 1942 income, asserted tax in the amount of his alteration of the tax credit determination incorporated in the contract.

Such a flagrant breach of a United States contract should not be sanctioned. Insuring the integrity of Government contracts warrants the granting of the writ.

2. The decision below frustrates the efficient administration of the present Renegotiation Act of 1951.[3] In holding that only a tentative credit can be inserted in a renegotiation agreement, the natural and probable consequence of the decision will be to prevent the execution of many renegotiation contracts and result in delaying for years the recoupment of excessive profits vitally needed for defense production. The thousands of defense contractors may well hestitate or refuse to make renegotiation contracts if some aspect thereof can be upset years later by some other government agency.

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[3] While the present case involves the Renegotiation Act of 1942 the same problems concern the Renegotiation Act of 1951.

The policy of Congress and the Administration is to settle speedily excessive profits and thereby promptly recoup such profits. This is accomplished only by expeditious renegotiation contracts negotiated on a "give and take" basis. Businessmen are interested primarily in settling finally the "net cost" of such a contract, i.e. how much must be repaid to the United States. Only by stipulating the gross excessive profits, the Section 3806(b) credit, and the cash balance, are all aspects of such profits finally determined. If the tax credit (often as high as 80% of the excessive profits determined) cannot be finally settled in a renegotiation contract, many contractors realize that years later they may have to pay further amounts (40% in this case) to the United States should the tax collector alter their tax credits. They, therefore, will find it more profitable not to make renegotiation contracts but to retain their excessive profits pending the many years it takes to determine them *de novo* before the Tax Court.

The Court of Appeals decision, in denying that the Secretary has authority to fix conclusively the tax credit in a renegotiation contract, seriously jeopardizes the Congressional policy of promptly settling and recouping excessive profits. Unless reversed, the decision below may ultimately result in millions of dollars of excessive profits being withheld for many years from the United States. Hundreds of excessive profits redetermination cases, which could be readily closed if complete final renegotiation contracts are permitted, may be added to hundreds of renegotiation cases now before the Tax Court.

Avoidance of these serious consequences warrants the granting of the writ.

3. The decision below erroneously decides important questions involving statutes relating to the proper administration of renegotiation of defense contracts.

(a) The Court below held that only a tentative or provisional Section 3806(b) credit can be inserted in a renegotiation contract. Whether the Secretary had authority to fix the credit as final depends upon the powers conferred upon him by the Renegotiation Act and the policy of that Act, and not, as the Court held, by considering merely the technical provisions of Section 3806(c) and Section 3760 of the Internal Revenue Code.

The Renegotiation Acts are war and defense measures. They confer broad war powers on the Secretaries which are not to be judged by peacetime standards. *Lichter* v. *United States,* 334 U. S. 742, 783; *Stein Bros. Manufacturing Company* v. *Secretary of War,* 7 T. C. 863, 881. Section 403(c)(4) of the 1942 Act and Section 105(d) of the 1951 Act expressly authorize such final agreements "for the elimination of excessive profits and for the discharge of any liability for excessive profits" as the Secretary deems desirable. Such agreements "may contain such terms and conditions as the Secretary deems advisable." By statute the agreement is conclusive "according to its terms" and "any determination made in accordance therewith shall not be annulled, modified, set aside or disregarded in any suit, action or proceeding."

In the light of the clear policy of Congress to recoup excessive profits expeditiously by any type of final renegotiation agreement the Secretary deems advisable to effectuate his war power duties, the authority of the Secretary

should not be hampered by technical or restrictive interpretations. Under the Acts the Secretary must "allow" against excessive profits the credit provided by Section 3806(b) of the Internal Revenue Code. He cannot really allow the credit unless he can do so finally. The Secretary admittedly can agree upon the amount of excessive profits and the amount of the cash repayment which will result in "the discharge of any liability for excessive profits." *Section 403(c)(4), supra.* The Section 3806(b) credit is the difference between such amounts. It is mathematically impossible for the Secretary to determine the discharge amount without at the same time finally determining the Section 3806(b) credit. Necessarily, therefore, the Secretary must have power to fix finally the amount of the credit.

In essence, the Court below decided that tax finality can be obtained only by a closing agreement with the Commissioner under Section 3760 of the Internal Revenue Code (R. 25). One may seriously question whether this Section which deals only with "tax liability" would permit a closing agreement as to the amount of the Section 3806(b) credit against excessive profits. In addition, the closing agreement procedure is so notoriously long and cumbersome that its adoption to determine the Section 3806(b) credit for a renegotiation contract would result in such delay that few contracts would ever be made. Congress by the Renegotiation Act demanded expeditious settlement of excessive profits. It is unthinkable that it intended that Section 3760 bar the Secretary from being able to carry out promptly the duties the Act imposed upon him.

Much of the lower Court's discussion involves Section 3806(c) of the Internal Revenue Code which permits refund

to the contractor if the credit allowed is too low. Such Section nowhere gives the Commissioner the right to claim additional tax if the credit allowed was too high. Section 3806(c), however, has no application to this case. It applies only to the type of renegotiation contract which does not fix the tax credit but stipulates only the amount of excessive profits or provides that the contractor shall receive "the credit allowable." In the instant case the parties stipulated that the Section 3806(b) credit was $280,000 and that it was the only refund "to which the contractor shall be entitled." This contractual provision made Section 3806(c) inapplicable to this case.

The error of the Court below is based on its failure to realize that this case presented, not questions involving the technical interpretation of tax statutes, but the scope of the broad war power authority conferred by the Renegotiation Act and the preservation of the integrity of government contracts.

(b) The question presented in this case which concerns many taxpayers—and which the Court below did not discuss—is whether the allowance of the tax credit against excessive profits is not in reality a collection of excessive profits. The petitioner here after paying the taxes shown on its returns never owed the United States anything except excessive profits. Renegotiation did not create any tax liability. It imposed only liability to repay the excessive profits determined. Recoupment resulted from the combination of the tax credit allowed and the cash repayment. If the tax credit was too high, as respondent contends, then the taxpayer did not pay enough excessive profits to the United States. But here by the specific terms of the

contract petitioner's liability for excessive profits was discharged. The Commissioner, by use of the tax deficiency procedure, cannot collect further excessive profits which have been discharged by the contract and which the United States is forbidden to collect.

The Treasury Department treats the tax credit as a tax refund in some cases and as a payment of excessive profits in others. The two roads which the Commissioner takes are inconsistent. This is clearly shown in a recent article discussing the Section 3806(b) credit. *Meyers, Penalties in Doing Business with the Government,* Proceedings of Eighth Annual New York University Institute of Taxation 1950, pp. 1305-07. It is important to many taxpayers that it be decided which road the Commissioner must follow. His inconsistent and restrictive attitude in connection with the tax aspects of renegotiation contracts warrants the scrutiny of this Court.

CONCLUSION

For the foregoing reasons this petition for a writ of certiorari should be granted.

Respectfully submitted,

November 12, 1951.

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APPENDIX A

I. Renegotiation of War Contracts

Relevant portions of Section 403 of the Sixth Supplemental National Defense Appropriation Act as amended by Section 801 of the Revenue Act of 1942, and as amended known as the Renegotiation Act of 1942, and as effective for the calendar year 1942, are as follows:[a]

"Sec. 403. (a) For the purposes of this section—

"(1) The term 'Department' means the War Department, the Navy Department, the Treasury Department, the Maritime Commission, . . .

• • •

"(c)(1) Whenever, in the opinion of the Secretary of a Department, the profits realized or likely to be realized from any contract with such Department, or from any subcontract thereunder whether or not made by the contractor, may be excessive, the Secretary is authorized and directed to require the contractor or subcontractor to renegotiate the contract price. . . .

"(2) Upon renegotiation, the Secretary is authorized and directed to eliminate any excessive profits under such contract or subcontract (i) by reductions in the contract price of the contract or subcontract, or by other revision in its terms; or (ii) by withholding, from amounts otherwise due to the contractor or subcontractor, any amount of such excessive profits; or (iii) by directing a contractor to withhold for the account of the United States, from amounts otherwise due to the subcontractor, any amount of such excessive profits under the sub-

[a] The analogous provisions in the Renegotiation Act of 1951 (65 Stat. ——, March 23, 1951, ch. 15, Title I; 50 U. S. C. A. App. Sec. 1215) are set forth in Section 105(b)(1)(8) and (d) thereof.

contract; or (iv) by recovery from the contractor or subcontractor, through repayment, credit or suit, of any amount of such excessive profits actually paid to him; or (v) by any combination of these methods, as the Secretary deems desirable. . . .

"(3) In determining the excessiveness of profits realized or likely to be realized from any contract or subcontract, the Secretary shall recognize the properly applicable exclusions and deductions of the character which the contractor or subcontractor is allowed under Chapter 1 and Chapter 2E of the Internal Revenue Code. In determining the amount of any excessive profits to be eliminated hereunder the Secretary shall allow the contractor or subcontractor credit for Federal income and excess profits taxes as provided in section 3806 of the Internal Revenue Code.

"(4) Upon renegotiation pursuant to this section, the Secretary may make such final or other agreements with a contractor or subcontractor for the elimination of excessive profits and for the discharge of any liability for excessive profits under this section, as the Secretary deems desirable. Such agreements may cover such past and future period or periods, may apply to such contract or contracts of the contractor or subcontractor, and may contain such terms and conditions, as the Secretary deems advisable. Any such agreement shall be final and conclusive according to its terms; and except upon a showing of fraud or malfeasance or a wilful misrepresentation of a material fact, (i) such agreement shall not be reopened as to the matters agreed upon, and shall not be modified by any officer, employee, or agent of the United States; and (ii) such agreement and any determination made in accordance therewith shall not be annulled, modified, set aside, or disregarded in any suit, action, or proceeding."

II. Mitigation of Effect of Renegotiation of War Contracts

Section 3806(a)(1), (b)(1) and (c) of the Internal Revenue Code, as added by Section 508 of the Revenue Act of 1942, amended by Section 701(c) of the Revenue Act of 1943, and as effective for the calendar year 1942, are, in part, as follows:

"(a) *Reduction for Prior Taxable Year.—*

"(1) *Excessive profits eliminated for prior taxable year.*—In the case of a contract with the United States or any agency thereof, or any subcontract thereunder, which is made by the taxpayer, if a renegotiation is made in respect of such contract or subcontract and an amount of excessive profits received or accrued under such contract or subcontract for a taxable year (hereinafter referred to as 'prior taxable year') is eliminated and, in a taxable year ending after December 31, 1941, the taxpayer is required to pay or repay to the United States or any agency thereof the amount of excessive profits eliminated or the amount of excessive profits eliminated is applied as an offset against other amounts due the taxpayer, the part of the contract or subcontract price which was received or was accrued for the prior taxable year shall be reduced by the amount of excessive profits eliminated.

• • •

"(b) *Credit Against Repayment on Account of Renegotiation or Allowance.—*

"(1) *General rule.*—There shall be credited against the amount of excessive profits eliminated the amount by which the tax for the prior taxable year under Chapter 1, Chapter 2A, Chapter 2B, Chapter 2D, and Chapter 2E, is decreased by reason

of the application of paragraph (1) of subsection (a); . . .

• • •

"(c) *Credit in Lieu of Other Credit or Refund.*—If a credit is allowed under subsection (b) with respect to a prior taxable year no other credit or refund under the internal revenue laws founded on the application of subsection (a) shall be made on account of the amount allowed with respect to such taxable year. If the amount allowable as a credit under subsection (b) exceeds the amount allowed under such subsection, the excess shall, for the purposes of the internal revenue laws relating to credit or refund of tax, be treated as an overpayment for the prior taxable year which was made at the time the payment, repayment, or offset was made."

III. Section 3760 of the Internal Revenue Code. Closing Agreements

(a) *Authorization.*—The Commissioner (or any officer or employee of the Bureau of Internal Revenue, including the field service, authorized in writing by the Commissioner) is authorized to enter into an agreement in writing with any person relating to the liability of such person (or of the person or estate for whom he acts) in respect of any internal revenue tax for any taxable period.

(b) *Finality.*—If such agreement is approved by the Secretary, the Under Secretary, or an Assistant Secretary, within such time as may be stated in such agreement, or later agreed to, such agreement shall be final and conclusive, and, except upon a showing of fraud or malfeasance, or misrepresentation of a material fact—

(1) The case shall not be reopened as to the matters agreed upon or the agreement modified, by

any officer, employee, or agent of the United States, and

(2) In any suit, action, or proceeding, such agreement, or any determination, assessment, collection, payment, abatement, refund, or credit made in accordance therewith, shall not be annulled, modified, set aside, or disregarded.

(GP—9118)

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OCTOBER TERM, 1951

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STOW MANUFACTURING COMPANY, INC., PETITIONER

v.

COMMISSIONER OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the Court of Appeals (R. 21–25) is reported at 190 F. 2d 723. The findings of fact and opinion of the Tax Court (R. 4–13) are reported at 14 T. C. 1440.

JURISDICTION

The judgment of the Court of Appeals was entered July 17, 1951. (R. 26.) A petition for rehearing was denied on August 14, 1951. (R. 27.) The petition for a writ of certiorari was filed on November 13, 1951. The jurisdiction of this Court is invoked under 28 U. S. C., Section 1254.

QUESTION PRESENTED

Taxpayer's contracts were renegotiated for the calendar year 1942 in the year 1943. The amount computed by the revenue agent as the excess profits tax paid on the profits determined to be excessive was admittedly too large and the resulting tax credit, incorporated in the renegotiation agreement, was accordingly erroneous. Did the Tax Court and the Court of Appeals correctly hold that the credit computed under Section 3806 is not a final adjudication of tax liability and that the Commissioner did not err in determining that there is a deficiency for 1942 within the meaning of Section 271 (a) of the Internal Revenue Code?

STATUTES INVOLVED

These will be found in the Appendix, *infra*, pp. 10–12).

STATEMENT

Taxpayer, a New York corporation, manufactured and sold large quantities of flexible shafting to the United States pursuant to contract. (R. 5.) In 1943, taxpayer negotiated with the Secretary of the Navy and his representatives with respect to the contract prices of renegotiable contracts for all fiscal periods of the taxpayer up to and including December 31, 1942. These negotiations were conducted pursuant to Section 403 of the Sixth Supplemental National Defense Appropriation Act, 1942, c. 247, 56 Stat. 226, as

amended, hereinafter referred to as the Renegotiation Act. As a result of these proceedings the Secretary of the Navy determined that taxpayer realized excessive profits for the year ended December 31, 1942, in the amount of $350,000. (R. 6.)

In order to ascertain the credit under Section 3806 of the Internal Revenue Code to be allowed against this determination of excessive profits, taxpayer requested the internal revenue agent in charge to compute the amount of the credit which would result from the elimination from taxpayer's gross income of $350,000. The internal revenue agent notified taxpayer and representatives of the Secretary of the Navy that the amount of the credit against excessive profits of $350,000 would be $280,000. Taxpayer concedes that the credit thus given resulted from an erroneous computation and that the correct credit should have been $252,000. After the computation of the credit, the Navy Department prepared the renegotiation agreement and sent it to the taxpayer. Taxpayer approved it and on June 1, 1943, the agreement was executed. (R. 6–7.)

The agreement provided *inter alia* that the tax credit of $280,000 "shall be the only refund of or credit against Federal taxes to which the Contractor shall be entitled by reason of elimination of said excessive profits," and that the finding with respect to excessive profits shall be "a final conclusive determination of the excessive profits

for all fiscal periods of the Contractor up to and including December 31, 1942, * * *." (R. 7–8.)

Taxpayer fully performed all the terms and conditions of the agreement. The Navy Department never attempted to reopen the agreement or to obtain further excessive profits. The agreement is still in full force and effect. (R. 9.) In the notice of deficiency mailed to the taxpayer on May 20, 1948, the proposed deficiency was computed in part as follows (R. 10):

Correct excess profits tax liability			$190,185.16
Excess profits tax assessed:			
Original, May 1943 list, Acct. No. 400009		$437,115.49	
Plus—additional assessment, May 11, 1948		9,657.90	
Total		$446,773.39	
Less:			
Tentative overassessment allowance	$4,024.92		
Sec. 3806 (b) credit	280,000.00	284,024.92	162,748.47
Deficiency in excess profits tax			$27,436.69

A unanimous Tax Court approved the deficiency (R. 10–13) and the Court of Appeals, also without dissent, affirmed (R. 21–25).

ARGUMENT

The unanimous decisions of both courts below that the Commissioner was not precluded by an erroneous credit allowed in renegotiation from ascertaining taxpayer's correct tax liability for the year is in accord with all prior decisions. *Universal Oil Products Co.* v. *Campbell,* 181 F. 2d

451, 478 (C. A. 7th); *Baltimore Foundry & Machine Corp.* v. *Commissioner,* 7 T. C. 998; *Hardy* v. *Commissioner,* decided October 29, 1948 (1948 P–H T. C. Memorandum Decisions, par. 48,219). There is, therefore, no conflict and taxpayer does not assert that one exists. The decision is, moreover, clearly correct.

1. The result reached below is in accord with the provisions of Sections 3806 and 271 (a) of the Code (Appendix, *infra,* pp. 11–12, 10), and is confirmed by the established rule of construction that only a closing agreement meeting all the requirements of Section 3760 (Appendix, *infra,* pp. 10–11), or a compromise agreement under Section 3761, requires the Commissioner to accept less, or the taxpayer to pay more, than the true tax liability imposed by the substantive Code provisions. *Botany Mills* v. *United States,* 278 U. S. 282, 287; *Payson* v. *Commissioner,* 166 F. 2d 1008 (C. A. 2d); *Joyce* v. *Gentsch,* 141 F. 2d 891, 895 (C. A. 6th); *Bank of New York* v. *United States,* 170 F. 2d 20 (C. A. 3d). "We think that Congress intended by the statute to prescribe the exclusive method by which tax cases could be compromised, requiring therefor the concurrence of the Commissioner and the Secretary * * *. When a statute limits a thing to be done in a particular mode, it includes the negative of any other mode. * * *." *Botany Mills* case, pp. 288–289.

Section 3806 affords not even the slightest support for taxpayer's basic assumption that in that

section Congress provided an additional method for final settlement of a tax liability. On the contrary, Section 3806 (c), as the Court of Appeals noted (R. 24–25), strongly suggests the opposite. In stating that if the credit "allowed" is less than the amount "allowable," the difference will be treated as an overpayment under provisions "relating to credit or refund," Congress made it clear that where the renegotiation credit was too little the taxpayer would under Section 3770 (a) (1) or (4) be entitled to a refund or an additional credit. It is plain from this provision, as the Court of Appeals stated (R. 25), that no final settlement of tax liability akin to a closing agreement in Section 3760 could have been intended because by express provision it was not binding on the taxpayer. The dubious suggestion that it was in any event binding on the Commissioner is completely dispelled by reading Section 3806 with the dovetailing provisions of Section 271 (a). Section 271 (a) provides explicit authority for the Commissioner's action here because it defines deficiency in terms of the amount by which the correct tax exceeds the tax returned less previous credits.

2. The reasons which taxpayer advances for granting the writ, in addition to its vaguely supported assertion (Pet. 8–11) that the decision below is wrong, are both based on untenable assumptions, and in any event furnish no justification for further review.

a. Taxpayer's primary reliance for granting of the writ (Pet. 5–6) is that the "sanctity of the contractual promise of the United States is here at stake." This contention is premised on the assumption that the renegotiation agreement treated the tax credit as a final adjudication of taxpayer's tax liability for the year. But the agreement (R. 7–9) nowhere states, either in terms or by implication, that by granting the credit the United States was finally settling taxpayer's tax liability. Taxpayer's assumption to the contrary is based on confusion of the term "credit" with "tax liability." But even if taxpayer were correct that the renegotiation agreement purported to be—contrary to statute, as explained, *supra*—a final agreement with respect to its tax liability for the year, there would be no occasion for a consideration of the question thus presented because it is settled by many decisions of this Court that officers of the United States cannot bind the United States by contract or otherwise when acting outside their authority. See, e. g., *Whiteside* v. *United States,* 93 U. S. 247, 257; *Wilber Nat. Bank* v. *United States,* 294 U. S. 120, 123–124, where the Court said: "* * * those dealing with an agent of the United States must be held to have had notice of the limitation of his authority."

b. Taxpayer also states the decision below "frustrates" the efficient administration of the Renegotiation Act of 1951. (Pet. 6–7.) The

contention is that contractors will "hesitate or refuse" to make renegotiation agreements unless the tax liability of the contractors can be finally settled in the agreement. It is argued that the Congressional and administrative policy speedily to recoup excessive profits will be thwarted. (Pet. 6.) This contention, even if taxpayer's premise be accepted, is one of legislative policy which should be addressed to Congress.

It may be pointed out, however, that the adoption of taxpayer's position that final liquidation of tax liability should be made in a renegotiation agreement would be very likely to have the opposite effect than that anticipated by taxpayer. As the Court of Appeals noted, the statute as interpreted by the Court of Appeals (R. 24) conforms "aptly with the purpose of Congress to effect speedy settlements, and yet not to cut off the rights of contractors who may be willing to cooperate in that aim. The amount of the 'excess' they must agree to irrevocably; the credit for taxes are not irrevocably concluded." It is reasonable to assume that neither contractors nor the Government would readily agree to a summary settlement of tax liability divorced from all of the safeguards to both parties incorporated in the Internal Revenue Code. The adoption of taxpayer's position would thus tend to defeat the very policy on which the position is predicated

CONCLUSION

The decision below is correct and there is no conflict of decisions. The petition for a writ of certiorari should be denied.

Respectfully submitted.

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DECEMBER 1951.

APPENDIX

Internal Revenue Code:

SEC. 271* DEFINITION OF DEFICIENCY.

As used in this chapter in respect of a tax imposed by this chapter "deficiency" means—

(a) The amount by which the tax imposed by this chapter exceeds the amount shown as the tax by the taxpayer upon his return; but the amount so shown on the return shall first be increased by the amounts previously assessed (or collected without assessment) as a deficiency, and decreased by the amounts previously abated, credited, refunded, or otherwise repaid in respect of such tax; * * *

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(26 U. S. C. 1946 ed., Sec. 271.)

SUBCHAPTER F—CLOSING AGREEMENTS AND COMPROMISES

SEC. 3760. CLOSING AGREEMENTS.

(a) *Authorization.*—The Commissioner (or any officer or employee of the Bureau of Internal Revenue, including the field service, authorized in writing by the Commissioner) is authorized to enter into an agreement in writing with any person relating to the liability of such person (or of the person or estate for whom he acts) in

* This section was amended by Section 14 (a) of the Individual Income Tax Act of 1944, c. 210, 58 Stat. 231, for taxable years beginning after December 31, 1942. Since the year involved here ends with December 31, 1942, the amendment is, of course, inapplicable. It may be noted that although the form of the amended statute is somewhat different there is no change material to the controversy here even had the amended statute been applicable.

respect of any internal revenue tax for any taxable period.

(b) *Finality.*—If such agreement is approved by the Secretary, the Under Secretary, or an Assistant Secretary, within such time as may be stated in such agreement, or later agreed to, such agreement shall be final and conclusive, and, except upon a showing of fraud or malfeasance, or misrepresentation of a material fact—

(1) The case shall not be reopened as to the matters agreed upon or the agreement modified, by any officer, employee, or agent of the United States, and

(2) In any suit, action, or proceeding, such agreement, or any determination, assessment, collection, payment, abatement, refund, or credit made in accordance therewith, shall not be annulled, modified, set aside, or disregarded.

(26 U. S. C. 1946 ed., Sec. 3760.)

SEC. 3806 [Added to the Code by Section 508 of the Revenue Act of 1942, c. 619, 56 Stat. 798, and amended by Section 701 (c) of the Revenue Act of 1943, c. 63, 58 Stat. 21] MITIGATION OF EFFECT OF RENEGOTIATION OF WAR CONTRACTS OR DISALLOWANCE OF REIMBURSEMENT.

(a) *Reduction for Prior Taxable Year.*—

(1) *Excessive Profits Eliminated for Prior Taxable Year.*—In the case of a contract with the United States or any agency thereof, or any subcontract thereunder, which is made by the taxpayer, if a renegotiation is made in respect of such contract or subcontract and an amount of excessive profits received or accrued under such contract or subcontract for a taxable year (hereinafter referred to as "prior taxable year") is eliminated and, in a taxable

year ending after December 31, 1941, the taxpayer is required to pay or repay to the United States or any agency thereof the amount of excessive profits eliminated or the amount of excessive profits eliminated is applied as an offset against other amounts due the taxpayer, the part of the contract or subcontract price which was received or was accrued for the prior taxable year shall be reduced by the amount of excessive profits eliminated. * * *

* * * * *

(b) *Credit Against Repayment on Account of Renegotiation or Allowance.*—

(1) *General Rule.*—There shall be credited against the amount of excessive profits eliminated the amount by which the tax for the prior taxable year under Chapter 1, Chapter 2A, Chapter 2B, Chapter 2D, and Chapter 2E, is decreased by reason of the application of paragraph (1) of subsection (a); * * *

* * * * *

(c) *Credit in Lien of Other Credit or Refund.*—If a credit is allowed under subsection (b) with respect to a prior taxable year no other credit or refund under the internal-revenue laws founded on the application of subsection (a) shall be made on account of the amount allowed with respect to such taxable year. If the amount allowable as a credit under subsection (b) exceeds the amount allowed under such subsection, the excess shall, for the purposes of the internal-revenue laws relating to credit or refund of tax, be treated as an overpayment for the prior taxable year which was made at the time the payment, repayment, or offset was made.

(26 U. S. C. 1946 ed., Sec. 3806.)

U. S. GOVERNMENT PRINTING OFFICE: 1951